No. 1143

FILED
MAY
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

J. B. MICHAEL & CO., INC.,
Petitioner,

vs.

JEROME C. POWERS,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Sixth Circuit.

LONGSTREET HEISKELL,
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ST. LOUIS LAW PRINTING CO., INC., 415 N. Eighth Street. CEntral 1-4477

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To the United States Court of Appeals for the Sixth Circuit.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, J. B. Michael & Co., Inc. (a Tennessee corporation), prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Sixth Circuit entered on the 7th day of April, 1964, affirming the judgment of the District Court of the United States for the Western District of Tennessee, Western Division, entered the 19th day of November, 1962.

OPINION OF THE COURT OF APPEALS.

The opinion of the Court of Appeals has not yet been reported but certified copy of same is attached to and made a part of the record which is being forwarded with this petition to the Court, and is made Appendix A hereto.

GROUNDS ON WHICH THE JURISDICTION OF THE SUPREME COURT IS INVOKED.

1. The decision of the Court of Appeals affirming the judgment of the lower Court in this case has decided an important question of the local law of Tennessee in a way in conflict with applicable local decisions.

2. The Court of Appeals for the Sixth Circuit has affirmed a verdict and judgment of the District Court in favor of Jerome C. Powers and against this petitioner holding that Powers was guilty of no direct negligence proximately contributing to his own injury. In an action by Orlin Henson against Jerome C. Powers and this petitioner growing out of the same accident, the Tennessee Court of Appeals has affirmed a verdict and judgment of the Circuit Court of Shelby County, Tennessee, against both defendants, thereby holding that Jerome C. Powers was guilty of direct negligence proximately contributing to his own injury and to the injury of the plaintiff in the State Court.

The decision of the Court of Appeals for the Sixth Circuit in affirming the judgment in favor of Jerome C. Powers and against this defendant in this case is in conflict with the local law of Tennessee as determined by the Tennessee Court of Appeals in its opinion, made Appendix B hereto.

QUESTION PRESENTED FOR REVIEW.

Where the State Court has declared, under the common law of the State, that a party has been guilty of direct and proximate negligence contributing to his own injury and the injury of another, can the party so guilty of direct and proximate negligence recover for his own injury in the United States District Court sitting in the same State?

STATEMENT.

In the action here under consideration, Jerome C. Powers sued J. B. Michael & Co., Inc. (a road builder under contract with the State of Tennessee to rebuild a section of highway), claiming liability on the part of the defendant as the sole party guilty of direct and proximate negligence and denying any negligence on plaintiff's part. Powers contended that Michael's negligence caused him to lose control of his car so that he crossed onto the wrong side of the highway and collided with a pickup truck driven by one Orlin Henson. By reason of this collision, Powers and Henson were both injured. The accident occurred in the State of Tennessee.

Michael defended this action on the ground that Powers was guilty of direct and proximate negligence causing his own injury and barring his recovery. A verdict was returned in favor of Powers and judgment for $12,500.00 was entered in the District Court. This judgment has now been affirmed by the Court of Appeals for the Sixth Circuit.

Orlin Henson sued Jerome C. Powers and J. B. Michael & Co., Inc., in the Circuit Court of Shelby County, Tennessee, for the injuries resulting to him in this same accident which injured Jerome C. Powers. Henson alleged that Powers and Michael were both guilty of negligence directly and proximately contributing to Henson's injury. A verdict was returned for the plaintiff Henson and judgment for $64,500.00 was entered in the Circuit Court against both Powers and Michael. This judgment of the State Court has now been affirmed by the Tennessee Court of Appeals.

It is the law of the State of Tennessee that the plaintiff cannot recover in an action for damages if he is guilty of

any direct and proximate negligence contributing to his own injury. It is also the established rule in Tennessee that a plaintiff can recover only if the defendant's negligence directly and proximately contributed to the plaintiff's injury.

It now, therefore, appears that the law of this case has been established in the State Court and that the original plaintiff in the Federal Court (Jerome C. Powers) has now by the State Court been held guilty of direct and proximate negligence contributing to his own injury, which negligence bars his recovery.

BRIEF AND ARGUMENT.

I.

Since the case of **Erie R. Co. v. Tompkins** there is no longer any Federal common law and the Federal Court enforces the common law of the state in which it is located. Two brief quotations are:

> "The laws of the several states, except where the constitution, treaties or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the Courts of the United States, in cases where they apply."
>
> 28 U. S. C. A., § 725;
>
> **Erie R. Co. v. Tompkins**, 304 U. S. 71, 58 S. Ct. 819.

> "Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state. And whether the law of the state shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern. There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a state whether they be local in their nature or 'general,' be they commercial law or a part of the law of torts."
>
> 304 U. S. 78, 58 S. Ct. 822.

See also:

Guaranty Trust v. York, 226 U. S. 99, 109-110, 65 S. Ct. 1464, 89 L. Ed. 2079.

II.

The law in the State of Tennessee is that direct and proximate negligence on the part of the plaintiff, no matter how slight, bars his recovery. The following brief

quotation is a direct statement of the Tennessee rule as it now exists:

> "Where the plaintiff and defendant are thus guilty of acts of negligence which together constitute the proximate cause of the injury, then the negligence of plaintiff, however slight, bars a recovery. **Railway v. Haynes**, 112 Tenn. 715, 81 S. W. 374; **Traction Co. v. Brown**, 115 Tenn. 325, 89 S. W. 319."
>
> **Grigsby & Co. v. Bratton**, 128 Tenn. 604.

Since the above quotation is the law of the State where this accident occurred and where the District Court was located, the only theory on which the plaintiff Powers could be entitled to recover from the defendant Michael is that Powers was guilty of **no** direct and proximate negligence.

III.

The law in Tennessee is that in order for the plaintiff to recover, he must show that the negligence of the defendant was a direct and proximate cause of the plaintiff's injury. Mere lack of care on the part of the defendant is not sufficient to support a judgment against him unless that lack of care was the producing cause of the plaintiff's injury. The following quotation is a direct statement of the existing law in Tennessee:

> "As noted in our cases, in a suit for damages resulting from injuries alleged to have been inflicted by the negligence of the defendant, it is incumbent upon the plaintiff to show three things: First, a breach of duty which defendant owed to him; second, a negligent breach of that duty; and, third, injuries received thereby resulting proximately from that breach of duty: **DeGlopper v. Railway & Light Co.**, 123 Tenn. 633, 134 S. W. 609; 33 L. R. A. (N. S.) 913; **Memphis St. Ry. Co. v. Cavell**, 135 Tenn. 462, 187 S. W. 179, Ann. Cas. 1918C, 42."
>
> **Mullen v. Russworm**, 90 S. W. 2d 533.

In the State Court case; therefore, there is only one theory under which Orlin Henson could recover a judgment against Jerome C. Powers, that is, that Powers was guilty of negligence which was a direct and proximate cause of plaintiff's injury.

IV.

In these cases, there was only one accident involved by which both Jerome C. Powers and Orlin Henson were injured. This accident occurred when Powers crossed to the wrong side of the highway and collided with the pickup truck driven by Henson. One single accident produces only one set of facts. When an accident has happened, the facts are fixed forever. These facts establish that the plaintiff, Jerome C. Powers, was either guilty of direct and proximate negligence or he was free of any direct and proximate negligence. He cannot be both guilty and not guilty when there is only one set of facts determining that issue.

It follows, therefore, that Jerome C. Powers should not recover from J. B. Michael & Co., Inc., in the instant case if Powers was guilty of any direct and proximate negligence. It equally follows that Orlin Henson should not recover from Jerome C. Powers unless Powers was guilty of direct and proximate negligence.

The two decisions, therefore, the one in favor of Powers in the District Court, and the one against Powers in the State Court, are absolutely inconsistent with each other.

V.

Where the law of a state is declared by the State Court, under **Erie R. Co. v. Tompkins** that State law is the law controlling upon the Federal Court located in that State. From this, it follows that where the judgment of the Federal Court located in a State is inconsistent and contrary to the law as declared by the State Courts, the

judgment of the Federal Court should be set aside and made consistent with the law as declared by the State Court.

There is a definite ruling to this effect in the case of **Doggrell v. Southern Box Co.** (Sixth Circuit, McAllister, Judge, 1953), 208 Fed. 2d 310.

The facts out of which the above cited opinion grew were that in an earlier decision of the same case (Martin, Judge, 1953; McAllister dissenting, 206 Fed. 2d 671) the Court of Appeals for the Sixth Circuit affirmed a judgment of the District Court for the Western District of Tennessee against Doggrell. In **Paper Products Co. v. Doggrell** (Tomlinson, Judge, 1953), 195 Tenn. 581, 261 S. W. 2d 127; the Tennessee Court held under the same state of facts that Doggrell was not liable and judgment dismissing the case against him was affirmed and petition to rehear denied. On petition to rehear pending in the Court of Appeals for the Sixth Circuit, the Tennessee decision was called to the Court's attention and the District Court judgment against Doggrell was reversed and judgment entered in his favor in conformity with the law as declared by the Tennessee State Court. The entire opinion by Judge McAllister setting aside the former decision and reversing its judgment therein is as follows:

> "For the reasons stated in the dissenting opinion heretofore filed, and because of the decisions of the Supreme Court of Tennessee in the cases of **Paper Products Co. v. Doggrell**, 261 S. W. 2d 127; and **Turner Brass Works, a Corporation, The Meyercord Company, a Corporation, v. Frank E. Doggrell, Jr., and W. G. Konz** (Decided July 17, 1953) unreported, as well as the decision and opinion of the Supreme Court of Tennessee on the petition for rehearing of **Paper Products Co. v. Doggrell**, 261 S. W. 2d 130, all filed during the pendency of a motion for rehearing

in the above entitled cause, in which it was held that the provision of the Arkansas statute in question was a penal statute and would not be enforced by the courts of Tennessee, and that appellant was a stockholder in a *de facto* corporation and, according to the law of Tennessee, would not be individually liable for the payment of the debts of the Arkansas corporation, I am of the opinion that the petition for rehearing should be granted; that the opinion heretofore filed should be set aside; and that a judgment should be entered in favor of appellant."

208 Fed. 2d 311.

CONCLUSION.

Since the plaintiff, Jerome C. Powers, cannot be both guilty of direct and proximate negligence and free from direct and proximate negligence under one factual situation, and since the State Court has now ruled that Powers was guilty of direct and proximate negligence, writ of certiorari should be granted by this Court to the end that the law of the State of Tennessee may be applied in the Federal Court in conformity with the decisions of the State Court. To do otherwise would be to allow to continue the unequal application of the law in favor of the non-resident obtaining jurisdiction in the Federal Court. This is the evil that was overcome by this Court in the case of **Erie R. Co. v. Tompkins**, supra.

The Court of Appeals of Tennessee is the Court of last resort to which an appeal lies to review a State Court civil case. However, the Supreme Court of Tennessee reserves the right, as does this Court, to grant certiorari to review the law of a case decided by the Tennessee Court of Appeals. Petitions for writs of certiorari have been filed asking the Supreme Court to review the law of the case of Orlin Henson v. Jerome C. Powers and J. B. Michael & Co.,

Inc., decided against Powers by the Tennessee Court of Appeals, but no writ has been granted by the Tennessee Supreme Court and probably will not be either granted or denied during the period of time within which this petitioner is allowed by law and the rules of this Court to file this petition.

If the action of the Tennessee Supreme Court is to deny the petitions for certiorari, the decision of the Tennessee Court of Appeals remains the decision of the Court of last resort; if the Tennessee Supreme Court grants a writ of certiorari, this Court should hold the final determination of this case until the final action of the Supreme Court of Tennessee.

Wherefore, it is respectfully submitted that this petition for writ of certiorari to review the judgment of the Court of Appeals for the Sixth Circuit should be granted.

LONGSTREET HEISKELL,
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Memphis, Tennessee.

Certificate of Service.

The undersigned attorney for petitioner, J. B. Michael & Co., Inc., hereby certifies that he has this day served the respondent, Jerome C. Powers, by mailing, postage prepaid, copy of this petition to Thomas R. Prewitt, attorney of record, at his office, Commerce Title Building, Memphis, Tennessee.

Longstreet Heiskell,
Attorney for Petitioner.

APPENDIX A.

OPINION OF UNITED STATES COURT OF APPEALS.

(Filed Apr. 7, 1964, Carl W. Reuss, Clerk.)

No. 15294.

United States Court of Appeals
For the Sixth Circuit.

Jerome C. Powers, Plaintiff-Appellee, v. J. B. Michael & Co., Inc., Defendant-Appellant.	Appeal from the United States District Court for the Western District of Tennessee, Western Division.

Decided April 7, 1964.

Before: Phillips, Circuit Judge, Magruder, Senior Circuit Judge for the First Circuit,* and Weinman, District Judge.

Magruder, Circuit Judge. Father Jerome C. Powers, driving his Buick car, had a collision with a truck on a Tennessee highway leading to Memphis. He was west bound and the truck was east bound. They met head-on. It was about dusk and also there was a drizzling rain at the moment of the collision. Both the plaintiff and the truck driver were unconscious after the impact and did not recall how the accident happened, and so there was no direct evidence of the cause of it.

* Sitting by designation pursuant to Section 294 (d), Title 28 U. S. Code.

Father Powers testified that he was going at a reasonable speed and that his car was always on the right-hand side of the highway. After the accident the plaintiff's car was somewhat over the line on the left-hand side of the road; but that was to be expected in the circumstances.

Plaintiff sued, not the State of Tennessee but rather a contractor with which the State had a contract to widen a section of Highway 64, on which Father Powers was traveling. Since the accident took place on a portion of Highway 64 not included in the contract, the defendant contended that it had no responsibility to put up signs or other warnings of a dangerous condition of the highway. Another defense was that, if the defendant was guilty of any common law negligence, the plaintiff was himself guilty of contributory negligence. The issue of contributory negligence was left to the jury under instructions as to which the defendant took no exception, and therefore under Rule 51, Federal Rules of Civil Procedure, there could not be any objection on this score. In fact the defendant does not raise contributory negligence as an issue on appeal.

Two of the points raised on appeal, which we must discuss hereinafter, refer to the trial judge's alleged error in admitting evidence. The third has to do with the trial judge's conduct at the trial, which the defendant says overstepped the line which even a federal judge may pursue. The fourth relates to whether the contractor had any duty to post a warning sign, because the accident occurred at a place on the highway excluded from the contract which the defendant had with the State of Tennessee. It may be noticed that this is not an action for breach of contract brought by the State of Tennessee against the defendant, but rather an action of tort brought by the plaintiff against the defendant for common law negligence proximately causing damages to the plaintiff.

It seems that at a bridge on Highway 64 there was a narrowing of the highway from 24 feet to 18 feet. There was evidence by the witness Wilkinson for the defendant that he had warned a representative of the highway department of the State of Tennessee of the dangerous condition of this part of the road because he had observed that several automobiles had gone off the edge of the highway at that location. Mr. Wilkinson, an employee of the defendant, testified that from the presence of ruts in the soft part of the approaches to the bridge he was under the impression that there was "some danger of a car running down off of that and losing control," and that he more than once told Mr. Graham, a division maintenance engineer of the Tennessee Highway Department, of the danger. Mr. Graham examined the locality and did not find that it was necessary to put up any more signs. If they had been installed, it would have had to be upon the part occupied by the defendant, in order to give adequate warning. It appears that the defendant and the highway department were in joint control of the premises and that the highway department did investigate whether any signs should be erected where the work was going on. The contract did not specify that the defendant should have warning signs on the portion of the highway which was included in its contract. However, as a practical construction of the contract, each party customarily warned the other of a dangerous condition which should be made known.

There was evidence that Father Powers ran off the road at a spot within the excluded portion of Highway 64 near a bridge where the highway became narrower. The only question which was raised at that time was whether the defendant had any duty to do anything about the danger to automobilists because of the narrowing of the highway.

The trial judge properly denied an instruction requested by the defendant that it was under no duty to do anything

about a dangerous condition on an excluded portion of the highway. Upon the contrary, he charged the jury to the effect that

> "[O]ne who creates or maintains on a highway, or on adjacent shoulders to a highway, a condition of such character that danger of injury therefrom to persons lawfully using the highway may or should, in the exercise of ordinary care, be foreseen or apprehended is under the duty of exercising reasonable care, by means of signs or other means to prevent such injury; and the fact that a State Highway Department is bound by contract to maintain safeguards to prevent accidents and to take other precautions for the protection of the motoring public cannot relieve the person who creates or maintains such danger from liability.
>
> "In this case, gentlemen of the jury, if you find that defendant created a hazard which was the proximate cause of the accident in question and resulting injuries, the Court instructs you that the defendant was not entitled to assume that the State Highway Department would comply with any contractual obligations that it had with respect to the condition in question."

With reference to the alleged error by the trial judge in admitting evidence, the plaintiff introduced evidence that accidents had taken place prior to the one to him at approaches to other bridges on Highway 64. The trial judge was careful to tell the jury that this evidence was not admissible on the issue of the original negligence of the defendant, but solely for the limited purpose of establishing that the defendant had notice of the danger at that point. Furthermore, the applicable Tennessee decisions do not require exact proof of identity of conditions in order to render the evidence of prior accidents admissible on the question of notice. One should not be hypercritical

upon this point. It is enough that the conditions were substantially the same when the other cars skidded off the highway. **John Gerber Co. v. Smith**, 150 Tenn. 255, 263 S. W. 974 (1924). The sufficiency of the showing of similarity of conditions is primarily a matter for the discretion of the trial judge. We perceive no abuse of discretion in this particular.

The other alleged error in the admission of evidence by the trial judge was that the defendant put up on the premises subsequent to the accident some danger signs and smudge pots. The trial judge cautioned the jury at the time this evidence was introduced that it was not admissible as proof of original negligence by the defendant, if there was such, but was admissible only as it tended to prove that this part of the highway was under the control of the defendant. This was repeated in the general charge. It is true that the possible prejudicial effect of such evidence remains in the case, but certainly it is a matter of discretion for the trial judge to admit this evidence for this limited purpose, and again we perceive no abuse of discretion. See **Trigg v. H. K. Ferguson Co.**, 30 Tenn. App. 672, 209 S. W. 2d 525 (1947).

The appellant alleges misconduct by the trial judge which denied it the right to a trial before an impartial tribunal. See "The Trials and Tribulations of an Intermediate Appellate Court," 44 Cornell L. Q. 3, 4 (1958). The evidence of examination by the trial judge concerns the testimony of Louie Graham, an employee of the Highway Department called by the defendant. There was the "loaded" question asked by the defendant, "Should the trial judge assume the role of a partisan advocate in his examination of the defendant's witness in such manner as to make the testimony of the witness appear to be contradictory and in such manner as to show partisanship on the part of the trial judge?" It was said by the defend

ant that the district court answered "Yes" to this question. Of course, the district court denied appearing as a "partisan advocate," which obviously he should not do. The trial judge allowed a complete direct examination by counsel for the defendant, a cross-examination by counsel for the plaintiff, a redirect examination, a recross-examination, and a redirect examination, before he undertook, with evident reluctance, his questioning of the witness. The trial judge told the jury that they were the sole judges of the facts and that his questioning of the witness was not intended to show any opinion by him as to the merits of the case. It is discretionary with a federal judge how far he should question a witness for the purpose of eliciting the truth from him. We perceive no abuse of discretion in this respect. Indeed, in his charge to the jury the trial judge was very fair to the defendant and failed to disclose any hostility to it.

A judgment will be entered affirming the judgment of the District Court.

APPENDIX B.

OPINION OF TENNESSEE COURT OF APPEALS.

(Filed Feb. 26, 1964. Bessie Buffaloe, Clerk.)

In the Court of Appeals of Tennessee,
Western Section at Jackson.

Orlin Henson,
Plaintiff in Error and
Defendant in Error,
vs.
Jerome C. Powers and J. B. Michael & Co., Inc.,
Defendants in Error and
Plaintiffs in Error.

No. 10.
Shelby Law.

From the Circuit Court of Shelby County.

Hon. John W. Wilson, Judge.

James M. Manire and John H. Harris, Jr., both of Memphis, Tenn., for Orlin Henson.

Thomas R. Prewitt of Memphis, Tenn., for Jerome C. Powers.

Longstreet Heiskell and William F. Kirsch, Jr., both of Memphis, Tenn., for J. B. Michael & Co., Inc.

Affirmed.

Opinion Filed.

BEACH, J.

AVERY, P. J. (W. S.),
CARNEY, J.

In this cause, as plaintiff in the lower court, Orlin Henson, recovered a jury verdict of $92,000 against Jerome C.

Powers and J. B. Michael & Co., Inc., as defendants. On motions for a new trial made by both defendants, the trial judge suggested a remittitur of $27,500, which being accepted under protest, reduced the judgment against both said defendants to $64,500. All three parties have appealed in error. The plaintiff, Orlin Henson, seeks to obtain a restoration of the remittitur of $27,500, and the defendants, Jerome C. Powers and J. B. Michael & Co., Inc., seek a reversal of the judgment against them, or to obtain a further reduction of same. In this opinion, the parties will be designated, as in the lower court, plaintiff and defendants, or called by their respective names, J. B. Michael & Co., Inc., being sometimes referred to as Michael and Jerome C. Powers as Father Powers.

The suit in this cause resulted from an accident which occurred on October 2, 1961 at about 5:30 P. M. on U. S. Highway 64, about 1½ miles east of Somerville in Fayette County, Tennessee. At that time, J. B. Michael & Co., Inc., a general contractor, was engaged, under a contract with the Highway Department of the State of Tennessee, in widening Highway 64 from an 18 foot highway to a 24 foot highway (3 feet on each side), for a distance of about 6½ miles from Laconia, Tennessee, west to Somerville, Tennessee. This contract excluded four bridges (two of them called "double bridges"), and approaches thereto of 200 feet on each side of said bridges. The accident occurred at the approach to the first bridge east of Somerville, known as Bennett's Creek bridge, when defendant, Powers, a Roman Catholic priest, driving a Buick sedan automobile, ran off the wide pavement with the right wheels of his automobile at a point where the pavement narrowed from 24 feet to 18 feet, hit the soft shoulder, dropped into a hole at that point, ran back onto the old concrete pavement, crossed the center line of same, and collided on the south side of the pavement with an east-

bound pickup truck driven by plaintiff. Plaintiff was severely injured in this collision and brought suit against both defendants.

The theory of plaintiff's case against Father Powers is that he was guilty of negligence which proximately caused or contributed to the plaintiff's injuries, in that he was not driving his car with proper care, did not keep a proper lookout ahead, did not have same under proper control, was driving at an excessive rate of speed under the circumstances, was driving on the wrong side of the highway, and that he violated the State statute which required him to drive on the righthand side of the highway, and to divide same with an oncoming vehicle. As to the defendant, J. B. Michael & Co., Inc., plaintiff's theory is that it was guilty of negligence which proximately caused or contributed to the accident and plaintiff's injuries, in that it maintained the roadway in a dangerous and unsafe condition, maintained no adequate and proper warning devices, and failed to maintain the widened area of the highway at the same level as the former or regular roadway.

Each of the defendants contends that the negligence of the other was solely and alone responsible for the accident and for plaintiff's injuries.

It is the theory of Father Powers that the negligence of defendant, J. B. Michael & Co., Inc., caused his automobile to drop off into a hole about a foot to a foot and one-half deep at the end of the widened portion of the highway, which caused him to lose control of his automobile, and resulted in the collision with and injuries to plaintiff. On the other hand, it is the theory of J. B. Michael & Co., Inc., that the negligence of Father Powers alone caused the accident, and that since the accident occurred about 150 feet beyond that portion of the high-

way included in its contract with the State, it cannot be held liable.

As a result of the collision, plaintiff sustained severe injuries consisting of a broken nose, a crushed right knee, severe lacerations of the left knee, laceration of the patella tendon, laceration of the thumb tendon, and a severe compound fracture and crushing of the right leg in the vicinity of the ankle. Plaintiff's right leg and ankle became infected and drained profusely for months. Plaintiff underwent fourteen or fifteen operations, including skin grafts affecting the area of his right ankle. After eight months of exposure, the infected open part of plaintiff's right leg was finally closed; but up to the time of the trial, his ankle had failed to fuse. According to medical testimony, he has sustained a 40 to 50% disability of his right leg.

In this court, as plaintiffs in error, each of the three parties to this suit have filed assignments of error. We will dispose of them separately.

Plaintiff has made only one Assignment of Error, which is:

> "The Court erred in suggesting a remittitur of $27,500 with respect to the verdict of the jury for the plaintiff in the amount of $92,000."

We think this Assignment of Error should be overruled. On this question, the case most nearly like the instant case, on its facts, that has been called to our attention, is Internat'l Harvester Co., et al, v. Sartain, 32 Tenn. App. 425, 222 S. W. 2d 854. In that case, the jury in the court of Circuit Court Judge A. O. Holmes, now Justice of the Supreme Court, returned a verdict of $60,000 which Judge Holmes by suggestion of remittitur reduced to $40,000, which reduction was approved by this court in an opinion

written by Judge Swepston, later Justice Swepston of the Supreme Court. Certiorari was denied by the Supreme Court. In the Sartain case, the plaintiff was 28 years of age, as compared with the 27 years of plaintiff in the instant case. In the Sartain case, the plaintiff, who was earning $100.00 per week, was totally disabled, whereas in the instant case, plaintiff was only partially disabled and is now back on his old job earning the same amount as before his injury, about $350.00 per month. As was said by Judge Swepston in the Sartain case, the judge's action in suggesting a remittitur should not be disturbed unless it appears that he abused his discretion. In the instant case, we can not say that the learned trial judge abused his discretion, and, consequently, the plaintiff's Assignment of Error is overruled.

Father Jerome C. Powers, as plaintiff in error in this court, has filed six Assignments of Error. Assignments of Error No. I and II are that there is no evidence to support the verdict and that the trial judge erred in overruling defendant Powers' motion for a directed verdict made at the end of all the proof. These Assignments of Error present the principal contention of defendant Powers. It is his theory of the case that he drove off the wide portion of the highway on to the narrow portion of same without negligence on his part, that the right wheels of his car dropped into the ditch or hold on the shoulder of the narrow portion of the highway, that because of that he lost control of the car and was not responsible for what happened thereafter. All of this was caused, according to his contention, by the negligence of defendant J. B. Michael & Co., Inc. which created the dangerous condition and failed to warn the traveling public against same, and, consequently, that J. B. Michael & Co., Inc., alone, should be held liable for the damage and injuries to plaintiff. This theory was fully and fairly

presented to the jury, which ruled against defendant Powers. The jury, with the evidence in the record before it, might properly have held in favor of defendant Powers, and if that had occurred, his appeal probably would not be before us. We cannot say, however, that his theory and his theory alone must necessarily be the conclusion of all reasonable minds. We think that reasonable minds could and did differ about the matter, and that on the evidence before it, the jury could and did properly reach the conclusion that negligence on the part of Father Powers contributed, in part, at least, to the proximate cause of plaintiff's injuries. Between Laconia and the point at which the accident occurred, there were signs which read, "Warning—This Section of Road Under Construction for Your Future and Convenience", also, "Danger—Road Under Construction—Travel at Your Own Risk—J. B. Michael & Co., Inc.", "Narrow Bridge", "Bumps Ahead", "Soft Shoulders", and "Caution—Fresh Oil". The jury might properly have held, as it did, that while these signs were not sufficient to relieve J. B. Michael & Co., Inc. from liability, they were sufficient to require more cautious driving on the part of Father Powers, and that his failure so to drive constituted part of the proximate cause of the accident. The jury might properly have held, and presumably did hold, that in the light of these warning signs, Father Powers was driving at an excessive rate of speed under the circumstances, did not keep a proper lookout ahead, and did not have his car under proper control. In that view of the case, the jury might properly have held that negligence on the part of Father Powers was at least partially responsible for his car being on the wrong side of the highway at the time and place of collision with plaintiff's truck.

Defendant Powers' Assignments of Error III, IV, V and VI complain of portions of the trial judge's charge, of

failure to give to the jury special requests tendered by defendant Powers, and that the verdict of the jury, even as reduced by remittitur, is excessive. We have carefully read the trial judge's charge, and in our opinion it presented fully and fairly the theories of plaintiff and of each of the defendants, including, of course, that of Father Powers. The charge, as given, was adequate without addition of the special requests presented by Father Powers, and, we cannot say that the trial judge erred, either affirmatively as to any portion of the charge given, or negatively in refusing any of the special requests tendered by defendant Powers. With reference to the contention that the amount of the jury's verdict, even as reduced, is still excessive, what we have said in denying plaintiff's effort to restore the remittitur is applicable. All of the Assignments of Error filed by defendant, Powers, will be overruled.

The defendant, J. B. Michael & Co., Inc., as plaintiff in error in this court, has filed twelve Assignments of Error. Assignments I and II are to the effect that there is no evidence to support the verdict and that the court erred in overruling the defendant Michael & Co., Inc.'s motion for a peremptory instruction made at the end of all the proof. These Assignments present its principal and main defense. It is the theory of this defendant that since its contract for improvement of the highway did not include the approach to the bridge where the accident occurred, and since the accident occurred about 150 feet beyond the portion of the highway to which its contract was applicable, no liability can be imposed against it. We cannot subscribe to this theory. In our opinion, the jury's verdict against the defendant, J. B. Michael & Co., Inc., is predicated on a finding that the negligence of this defendant in failing to warn the traveling public of the dangerous condition where the widening of the highway

ended, constituted at least a part of the proximate cause of plaintiff's injuries. From 40 C. J. S.—Highways,—Sec. 262, cited with approval in Foster & Creighton Co. v. Hale, 32 Tenn. App. 208, 222 S. W. 2d 222, which will be hereinafter discussed, we quote as follows:

> "The duty of guarding against, or warning of, danger from a defect or obstruction, and liability for failure to do so, are also on an individual who has caused a defect or placed an obstruction on the highway. A highway contractor who negligently fails to guard, or maintain proper barriers, lights or other warning signals, at unsafe places near the work of construction or repair of the highway, may be held liable for injuries resulting therefrom, even though he acted without negligence in creating the dangerous situation; and this liability exists regardless of the requirements of his contract with the highway authorities, and irrespective of any liability on the part of the governmental body employing the contractor."

In 25 Am. Jur.—Highways—Section 280, we find the statement, "Dangerous excavations in close proximity to a highway may also constitute public nuisances." Also, from 25 Am. Jur.—Highways—Section 530, we quote as follows:

> "The general rule is that one who creates or maintains, on premises adjacent to a highway, a condition of such character that danger of injury therefrom to persons lawfully using the highway may or should, in the exercise of ordinary care, be foreseen or apprehended is under the duty of exercising reasonable care, by means of guards, barriers, or otherwise, to prevent such injury, although the existence of any such duty under the common law has been denied by some courts."

In Foster & Creighton Co. v. Hale, 32 Tenn. App. 208, 222 S. W. 2d 222, judgment against a road contractor was affirmed where plaintiff's intestate rode his motorcycle into an unmarked ditch in a street being repaired by the defendant. The ditch in that case was about 1½ feet deep, approximately the same depth as the ditch or hole into which defendant Powers drove the right wheels of his automobile. From the opinion of the Court of Appeals in the Foster & Creighton case, written by Howard, J., we quote as follows:

> "We think that the defendant was under a legal duty to warn the traveling public of dangerous pitfalls appearing in that part of the street in use, and a failure to do so was negligence for which the defendant would be liable. Furthermore, the driver of motor vehicles had a right to assume that the travelway open and in use was reasonably safe and free from pitfalls."
>
> Foster & Creighton v. Hale, 32 Tenn. App. 215.

In Sherman White & Co. v. Long, 205 Tenn. 295, 326 S. W. 2d 469, although the judgment in that case was for the defendant, the accident there involved being held not to have been foreseeable, the Supreme Court, speaking through Mr. Chief Justice Neil, said:

> "The fact that the Department of Highways determines the location and height of a fill, and it is so constructed by the contractor, it is held '*but this did not relieve defendant of the duty to adopt reasonable safeguards to protect the traveling public from injury which might be reasonably apprehended* from the presence of the obstruction thus created in the highway.' Finchem v. Oman, 18 Tenn. App. 40, 72 S. W. 2d 564, 567. The italicized language clearly states the rule as to the contractor's duty, that is, he must safeguard an obstruction when, by the exercise

of due care, he should reasonably foresee or apprehend that it may endanger the traveling public."

Sherman White & Co. v. Long, 205 Tenn. 304.

In Finchem v. Oman, 18 Tenn. App. 40, 72 S. W. 2d 564, the judgment of the lower court based on a peremptory instruction for the defendant was reversed. In that case, the plaintiff was injured by running his automobile into an unmarked fill which partially obstructed the highway. From the opinion of the Court of Appeals in that case, written by Faw, P. J., we quote as follows:

"The embankment or fill on and across a portion of the highway at the point in question was not a nuisance, as alleged in the first count of plaintiff's declaration, for the defendant had a lawful right to erect the fill in the process of the construction or reconstruction of the highway, under his contract with the State Highway Department; but reasonable men could not differ about the fact that the fill disclosed by the proof constituted an obstruction to the customary use of the highway. The defendant, therefore, owed to travelers on the highway the duty of using proper precautionary means to warn them of the presence of the obstruction. The proof was conflicting with respect to the degree of the danger to be reasonably anticipated from the presence of the fill in the highway, and also as to whether defendant did or did not display a 'red light' on the fill as a warning signal."

Finchem v. Oman, 18 Tenn. App. 44.

In the Finchem case, the obstruction was on that part of the highway covered by defendant's contract, as was the ditch in the Foster & Creighton case; whereas, in the instant case, the ditch into which Father Powers ran his automobile was just beyond the limit of Michael's contract. We think, however, that this makes no difference.

so far as the responsibility of defendant Michael to warn the traveling public is concerned. The test, as was stated by the Supreme Court in **Sherman White Co. v. Long**, turns on the foreseeability of the danger. The record in the instant case discloses that defendant Michael had been repeatedly requested by the State acting through its Highway Department or its Highway Patrol to erect warning signs, and particularly so by Trooper Morrisett, who testified that he had made such request as often as once or twice a week for several weeks preceding the accident. From the testimony of Trooper Morrisett, we quote, as follows:

"Q. What did you tell him?

A. I asked him to put up signs with reference to the—some type of danger signs with reference to where the new pavement stopped and where they started back to the old pavement and the bridges.

Q. Did you tell him this before October 2, 1961?

A. Yes, sir.

Q. Do you know, or do you remember, how often you told him to do this?

A. No, sir, I would say approximately once, maybe, or twice a week.

Q. Pretty regularly, you told him?

A. Yes, sir.

Q. That this hole needed some warning of some type?

A. Yes, sir."

With testimony such as this before the jury, we think the trial judge ruled correctly when he denied the motion of J. B. Michael & Co., Inc., for a directed verdict; and its Assignments of Error I and II will be overruled.

Assignment of Error No. III filed by defendant Michael questions the amount of the jury's verdict, even as re-

duced by remittitur. This has been discussed already, and further discussion is unnecessary. Assignment of Error III is overruled.

Assignment of Error IV is that the court erred in overruling the motion of the defendant Michael for a mistrial after the plaintiff's attorney had wilfully questioned defendant Michael's foreman concerning the placing of flares and warning signs at the end of the project on the night after the accident when the court had previously ruled that evidence of such action was inadmissible. We cannot say that the learned judge abused his discretion in making this ruling. In any event, under the provisions of the harmless error statute, section 27-117 T. C. A., such ruling would not, in our opinion, constitute reversible error. Assignment of Error IV is overruled.

Assignment of Error V is that the court erred in permitting counsel for defendant Powers to read the notation in the personal diary of Michael's employee Gordon Bedwell, which stated: "Had another bad wreck this evening at 6:00 P. M. car from S. C. ran off wide pavement onto shoulder losing control hitting pickup truck head on." In our opinion, the trial judge should have excluded this evidence; but, under the provisions of the harmless error statute, Section 27-117 T. C. A., no reversal of the cause should be granted. Assignment of Error V is, therefore, overruled.

Other Assignments of Error filed by defendant J. B. Michaels & Co., Inc., numbered VI, VII, VIII, IX, X, XI and XII, complain of portions of the trial judge's charge, and of his refusal to give in charge to the jury special requests presented by the defendant Michael. As stated above, we think the charge was full and fair and that it amply covered the subject matter presented in the special instructions. All of said Assignments of Error are, therefore, overruled.

All of the Assignments of Error filed, both by plaintiff and by the defendants, will be overruled and the judgment of the lower court affirmed. A judgment will be entered in this court in favor of plaintiff, Orlin Henson, for $64,500 against defendant, Jerome C. Powers and against defendant, J. B. Michael & Co., Inc., together with interest thereon from March 20, 1963, the date on which motions for new trial were overruled.

The costs of the cause will be adjudged against both of said defendants and their sureties on the appeal bonds filed in this cause.

Bejack, J.

Avery, P. J. (W. S.).
Carney, J.

The State of Tennessee,

I, Bessie Buffaloe, Clerk of the Court of Appeals of said State for the Western Division thereof, at Jackson, do hereby certify that the foregoing is a true, perfect and complete copy of the Opinion pronounced by said Court at its January Term, 1964, in the case of Orlin Henson against Jerome C. Powers and J. B. Michael & Co., Inc., as appears of record now on file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of the Court at office in the City of Jackson on this the 8th day of May, A. D. 1964.

Bessie Buffaloe,

(Seal) Clerk.

By .....

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1963.

No. 1143.

J. B. MICHAEL & CO., INC.,
Petitioner,
vs.
JEROME C. POWERS,
Respondent.

BRIEF

Of Respondent in Opposition to Petition for Writ of Certiorari.

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BRIEF

Of Respondent in Opposition to Petition for Writ of Certiorari.

ALLEGED GROUNDS ON WHICH JURISDICTION OF THE COURT IS INVOKED.

There is no ground for invoking jurisdiction of this Court in this cause. The question presented for review in petition for certiorari was not raised in the United States Court of Appeals for the Sixth Circuit, which handed its opinion down on April 7, 1964 (App. A), notwithstanding the fact that the decision of the Tennessee Court of Appeals (with which the Federal decision is purportedly in conflict) was decided February 26, 1964 (App. B). Furthermore, the United States Court of Appeals decided no question of State law in conflict with applicable Tennessee decisions.

STATEMENT OF THE CASE.

In a tort case, resulting from an automobile accident that occurred in the State of Tennessee, respondent, Father Jerome C. Powers, recovered judgment, after jury verdict, in the United States District Court for the Western District of Tennessee, Western Division, against petitioner, J. B. Michael & Co., Inc. This judgment was affirmed on appeal by the Court of Appeals for the Sixth Circuit. Prior to action of the United States Court of Appeals, one Orlin Henson, in suit arising out of same accident, recovered judgment, after jury verdict, against both Powers and J. B. Michael & Co., Inc., in the Circuit Court of Shelby County, Tennessee; and this judgment was affirmed on appeal by the Tennessee Court of Appeals (App. A and B). Petitioner did not raise the question now presented, in the United States Court of Appeals, prior to date its opinion was filed; and neither did petitioner file any petition for rehearing in that Court, in the light of the Tennessee Court of Appeals decision. In the State Court proceedings, the rights and liabilities as between Powers and J. B. Michael & Co., Inc., were not put in issue by cross complaint or other adversary proceedings. Henson simply sued both parties and recovered a joint judgment (App. B).

ARGUMENT.

Petitioner failed to raise the question now presented in the United States Court of Appeals, notwithstanding the fact that the opinion of the Tennessee Court of Appeals, upon which reliance is now had, was decided over one month before the United States Court of Appeals handed down its decision. Since the question presented in this Court was not raised below, it would seem that this Court should not consider it on petition for certiorari.

Ellis v. Dixon, 75 S. Ct. 850, 349 U. S. 458, 99 L. Ed. 1231, rehearing denied, 350 U. S. 855.

However, had the question been presented to the United States Court of Appeals, that Court, under controlling Tennessee decisions, would have affirmed the District Court judgment. The very question now raised for the first time in this Court was decided by the Supreme Court of Tennessee in 1934 in the case of **Wiles v. Young, 167 Tenn. 224, 68 S. W. 2d 114.** In that case, arising out of an automobile accident, the plaintiff sued defendant for damages to his automobile. Prior to institution of that suit, a Miss Cooley, guest in the plaintiff's car, had recovered judgment against both parties for her personal injuries; and plaintiff had paid "his pro rata part" of the Cooley judgment. Defendant filed plea averring "the present suit was for damage suffered by plaintiff's car in the accident mentioned, and that the judgment in the suit of Miss Cooley against plaintiff and defendant was a judicial determination that plaintiff was guilty of negligence that proximately caused or contributed to the collision." The Trial Judge sustained the above plea and dismissed the suit, but the Supreme Court of Tennessee reversed, stating:

> "It is true both plaintiff and defendant were parties to the former suit and the judgment therein

was an adjudication that the plaintiff here was guilty of negligence. That is to say, plaintiff was adjudged to be guilty of negligence with respect to Miss Cooley—of a breach of duty toward Miss Cooley. It was not adjudged in the former suit, so far as this record shows, that plaintiff was guilty of any negligence with respect to defendant—of a breach of duty toward defendant.

The general rule is that parties to a judgment are not bound by it in subsequent controversies between each other, unless they were adversaries in the suit in which the judgment was rendered, 15 R. C. L. 1013; Freeman on Judgments (5th Ed.), § 424.

. . . . . .

So in the case before us the finding in the earlier case that plaintiff was guilty of negligence in respect to Miss Cooley is not a determination that he was guilty of negligence with respect to the defendant which, as a contributing cause, would bar this suit against defendant."

(68 S. W. 2d, at pp. 114, 115.)

The above holding of the Supreme Court of Tennessee, the court of last resort in that State, is still the law of Tennessee; and for that matter, it follows the great weight of authority throughout the country, as pointed out in annotation, **152 A. L. R. 1066**, as follows:

"One phase of the conclusiveness, inter se, of a judgment against codefendants in a negligence action is treated in an annotation in 101 A. L. R. 104, which is supplemented in 142 A. L. R. 727, entitled 'Judgment for plaintiff in action in tort or contract against codefendants, as conclusive in subsequent action between codefendants as to the liability of both or the liability of one and nonliability of the

other,' in which many cases are cited to the statement that 'while the cases are not entirely in harmony, sometimes even in the same jurisdiction, the rule supported by the great weight of authority is that a judgment in favor of the plaintiff in an action against two or more defendants is not res adjudicata or conclusive of the rights and liabilities of the defendants inter se in a subsequent action between them, unless those rights and liabilities were expressly put in issue in the first action, by cross complaint or other adversary pleadings, and determined by the judgment in the first action.'"

The writ should be denied for yet another reason. The jury verdict in favor of respondent Powers in the United States District Court was handed down prior to verdict and judgment in the State Court action, not subsequent thereto. Thus, all other questions aside, the Federal Court judgment on a jury verdict certainly could not be affected by a subsequent jury verdict in a State Court proceeding.

For the reasons stated, the petition for writ of certiorari has no conceivable basis and should be denied.

Respectfully submitted.

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Jérome C. Powers.

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Of Counsel.